REUBEN QUICK BEAR, RALPH EAGLE FEATHER and CHARLES TACKETT, on behalf of themseles and all other members of the Sioux Tribe of Indians of the Rosebud Agency, South Dakota, *Appellants*,

vs.

FRANCIS E. LEUPP, Commissioner of Indian Affairs; JAMES RUDOLPH GARFIELD Secretary of the Interior; GEORGE BRUCE CORTELYOU, Secretary of the Treasury, ET AL. *Appellees.*

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, 1907.

No. 569.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEES.

I.

HISTORY OF APPROPRIATIONS OF PUBLIC MONEYS FOR EDUCATION OF INDIANS.

The education of the Indians in the United States began under the auspices of the Catholic Mission Schools, which were erected many years ago at the cost of charitable

Catholics, and with the approval of the Government of the United States, whose policy it was then to encourage the civilization of the Indians through the work of religious organizations.

Under the provisions of the Act of 1819, ten thousand dollars were appropriated for the purpose of extending financial help "to such associations or individuals who are already engaged in educating the Indians" as may be approved by the War Department. In 1820 twenty-one schools conducted by different religious societies were given eleven thousand, eight hundred and thirty-eight dollars ($11,838), and from that date until 1870, the principal educational work in relation to the Indians was under the auspices of these bodies, aided more or less by the Government. For a long time the different denominational schools referred to were aided by the Government without any formal contract.

In 1870 an Act of Congress was passed appropriating one hundred thousand dollars ($100,000) for the support of Indian schools among Indian tribes not otherwise provided for, *i. e.*, among tribes not having treaty stipulations providing funds for educational purposes, and these appropriations continued until 1876. Contracts were made annually with the mission schools of the different denominations payable out of this appropriation for the education of Indian pupils. As to the tribes having funds for educational purposes under treaty stipulations, contracts were also made with the mission schools of the different denominations payable out of the treaty funds. In 1876 Congress began the general appropriation "for the support of industrial schools and other educational purposes for the Indian tribes," and these annual appropriations from the public moneys of the United States have been made from that time until the present. These appropriations always were put in the appropriation Acts under the heading "Support of Schools"—and from these public funds, and in the discretion of the Commissioner

of Indian Affairs, from the tribal funds hereinafter explained, were paid the amounts due under the contracts made by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior with the various denominational schools for the education of Indian pupils.

Some time before 1895 opposition developed to these contracts with denomination schools, on the ground that the public moneys of the United States raised by taxation should not be used for education in sectarian institutions, and also for other reasons.

Accordingly there is found in the Appropriation Act of 1894, Chapter 290 (28 Statutes at Large, page 311), approved August 15, 1894, in that part of the Act appropriating the public moneys for the support of Indian schools and under the heading "Support of Schools," the following:

> "That the expenditure of money appropriated for school purposes under this Act shall be at all times under the supervision and direction of the Commissioner for Indian Affairs, and in all respects in conformity with such conditions, rules and regulations as to the conduct of and methods of instruction and expenditure of money as may, from time to time, be prescribed by him, subject to the approval of the Secretary of the Interior.
>
> "Provided, That the Secretary of the Interior is hereby directed to inquire into and investigate the propriety of discontinuing contract schools and whether, in his judgment, the same can be done without detriment to the education of Indian children, and that he submit to Congress, at the next session, the result of such investigation, including an estimate of the annual cost, if any, of substituting Government schools for contract schools, together with such recommendations as he may deem proper."

In his annual report for the fiscal year ending June 30, 1894, the Secretary of the Interior said:

> "The contract schools are now the subject of general discussion. I agree fully with those who oppose the use of public money for the support of sectarian schools. But this question should be considered practically. The schools have grown up. Money has been invested in their construction at a time when they were recognized as wise instrumentalities for the accomplishment of good. I do not think it proper to allow the intense feeling of opposition to sectarian education, which is showing itself all over the land, to induce the Department to disregard existing conditions. We need the schools now, or else we need a large appropriation to build schools to take their place.
>
> "It would scarcely be just to abolish them entirely—to abandon instantly a policy so long recognized. My own suggestion is that they should be decreased at the rate of not less than 20% a year. Thus, in a few years more, they would cease to exist, and during this time the Bureau would be gradually prepared to do without them, while they might gather strength to continue without Government aid. This is the policy which is now controlling the Department, and, unless it is changed by legislation, it will be continued. The decrease in the appropriation for the present fiscal year is 20%."

Congress, in pursuance of this recommendation, introduced for the first time in the Appropriation Act of 1895, Ch. 188 (28 Stat. at Large, page 888), a limitation on the use of public money in sectarian schools.

The Act appropriates, under the heading "Support of Schools," of the public moneys of the United States "for the support of Indian day and industrial schools and for other purpose" . . . $1,164,350." . . .

"Provided, that the Secretary of the Interior shall make contracts, but only with the present contract schools, for the education of Indian pupils during the fiscal year ending June 30th, 1896, to an extent not exceeding 80% of the amount so used in the fiscal year 1895, and the Government shall, as early as practicable, make provision for the education of Indians in Government schools."

(See 28 State at Large, page 903.)

Congress, in the Indian Appropriation Act of 1896, Ch. 398, appropriated from the public moneys of the United States, under the head "Support of Schools," "for support of Indian day and industrial schools and for other educational purposes," . . . $1,235,000." . . . and then as a qualification upon the appropriation, and following immediately thereupon, under the same heading, "Support of Schools," occurs the following language in the act:

"And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school. Provided, that the Secretary of the Interior may make contracts with contract schools and apportioning, as near as may be, the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year 1897, but shall only make such contracts at places where non-sectarian schools can not be provided for such Indian children, and to an amount not exceeding 50% of the amount so used for the fiscal year 1895."

(See 29 Stat. at Large, page 345.)

Congress, in the Indian Appropriation Act of 1897, Ch. 3, appropriated from the public moneys of the United States, under the head of "Support of Schools," "for support of

Indian day and industrial schools, and for other educational purposes . . . $1,200,000 . . . ." and then as a qualification upon this appropriation, and following immediately thereupon, under the same heading, "Support of Schools," occurs the following language:

> "And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school. Provided, the Secretary of the Interior may make contracts with contract schools, apportioning as near as may be the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year 1898, but shall only make such contracts at places where non-sectarian schools can not be provided for such Indian children, and to an amount not exceeding 40% of the amount so used for the fiscal year 1895."
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> (See 30 Stat. at Large, page 79.)

Congress, in the Indian Appropriation Act of 1898, Ch. 545, appropriated from the public moneys of the United States, under the head of "Support of Schools" "for support of Indian day and industrial schools, and for other educational purposes, . . . $1,100,000 . . . Provided, that the Secretary of the Interior may make contracts with contract schools apportioning as near as may be the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year of 1899, but shall only make such contracts at such places where non-sectarian schools can not be provided for such Indian children, and to an amount not exceeding 30% of the amount so used for the fiscal year 1895."

(See 30 Stat. at Large, page 587.)

Congress, in the Indian Appropriation Act of 1899, Ch. 324, appropriated from the public moneys of the United

States, under the head of "Support of Schools," "for support of Indian day and industrial schools, and for other educational purposes, . . . $1,100,000, . . . Provided, that the Secretary of the Interior may make contracts with contract schools, apportioning as near as may be the amount so contracted for among schools of various denominations for the education of Indian pupils during the fiscal year 1900, but shall only make such contracts at places where non-sectarian schools can not be provided for such Indian children, and to an amount not exceeding 15% of the amount so used for the fiscal year 1895, the same to be divided proportionately among the said several contract schools, this being the final appropriation for sectarian schools."

(30 Stat. at Large, page 942.)

Ths several Indian annual Appropriation Acts since 1899, to wit, beginning with 1900 to the present time, contain under the head of "Support of Schools" simply a general appropriation of public moneys "for the support of Indian and industrial schools, and for other educational purposes," without any proviso to any of them respecting contracts with sectarian schools, or without any statement in any of them of the policy of the Government with respect to the sectarian schools.

It will be observed that the phrase, "and it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school," which is cited and relied on in paragraph 7 of the bill, is found only in the Indian Appropriation Acts of 1896 and 1897, and in no prior or subsequent Acts of Congress; that in these two Acts it is a limitation on the appropriation of public moneys, and is found only under the heading "Support of Schools," under which the public money of the United States is appropriated for support of Indian Schools, and does not occur in any other part of these Acts of Congress. The appellees, therefore, submit, that

this statement of policy, in so far as it can now have any legal effect, was intended only to apply to appropriations of public moneys for education in sectarian schools, and inasmuch as the appropriation of public moneys for these purposes was being reduced from year to year by a percentage which would make the last appropriation to be for the fiscal year ending June 30, 1900, there was no necessity for repeating the phrase containing the policy of the Government in any Acts after 1897. The cessation of the appropriation from the public moneys for education in the sectarian schools, was treated as the accomplishment of the purpose contained in the statement of the policy found in the Acts of 1896 and 1897.

This statement contains all the matter pertinent to the appropriation of public moneys for the support of education in sectarian schools. These appropriations ceased with the Indian Appropriation Act of 1899, have never been made since, nor is anyone asking that they should be made, or that any public moneys of the United States raised by taxation should be employed for such purposes (Record, pages 14-8).

II.

History of "Tribal Funds" and their Application for Educational Purposes Among Indians.

Entirely separate and apart from the public moneys which, as hereinbefore stated, were appropriated until 1900 for education in sectarian schools, there are other funds known as "Tribal Funds," which may be applied for these purposes. These funds the appellees respectfully submit are not public moneys gratuitously appropriated for public education among the Indians, but really belong to the Indians themselves. These tribal funds may be roughly grouped into two classes:

(*a*) Where cessions of land or other property have been made by the Indians, and in consideration thereof a certain

sum of money is deposited in the treasury of the United States, which is used for the Indians in the discretion of the Secretary of the Interior. These are called "Trust Funds."

(*b*) Where cessions of land or other property have been made by the Indians under treaties, and in consideration therefor the Government of the United States has by treaty bound itself to furnish money for the civilization and education of the Indians. These are called "Treaty Funds."

Examples of these funds are as follows:

Menominee Fund: Interest, $7,651.96 per annum (Treaty of 1848, Art. 5, 9 Stat. at Large, 952).

Menominee Log Fund: Interest, $76,313.98 per annum (Act of March 22, 1882, 22 Stat. at Large, 30; Act of June 12, 1890, 26 Stat. at Large, 146).

Osage Fund: Interest, $416,371.95 per annum (Treaty 1865, Art. 2, 14 Stat. at Large, 687; Act July 15, 1870, 16 Stat. at Large, 362; Act of June 16, 1880, 21 Stat. at Large, 292).

Osage Fund: Interest on $69,120, 5% (Treaty January 2, 1825, for educational purposes per Senate resolution, January 9, 1838, 7th Stat. at Large, 242).

The yearly amounts provided for the Indians under treaties are annually appropriated in the Indian Appropriation Acts, not in that part of the Act under the title "Support of Schools" wh[illegible] appropriated the public money of the United States, but under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," for although formally appropriated the moneys are not regarded as the moneys of the United States, but moneys belonging to the Indians, due to them under treaties in consideration of their cession of lands and other rights.

But inasmuch as according to Indian custom, the property is held in common, and inasmuch as the Indians are regarded as wards of the nation, the money is not dis-

tributed per capita, but is expended for them, and for their benefit and advantage, under the discretion of the Secretary of the Interior. For some of the laws conferring this discretion, see 14th Stat., 687; 16 Stat., 362; 21 Stat., 292; 22 Stat., 30; 25 Stat., 895; 26 Stat. 146, 344.

As to the "Sioux Funds" directly in controversy, the facts are as follows:

Sioux Trust Fund.

On March 2, 1889, the Act of Congress of 1889, Ch. 405, was approved. This was entitled "An Act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, and to secure the relinquishment of the Indian tribe to the remainder." Under this Act the Indians made certain cessions of land, and in partial consideration therefor it was provided in Section 17 of the Act as follows:

> "And in addition thereto, there shall be set apart out of any sum in the Treasury not otherwise appropriated, the sum of three million dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest on which at five per cent. per annum shall be appropriated under the direction of the Secretary of the Interior to the use of the Indians receiving rations and annuities upon the reservations created by this Act in proportion to the number that shall so receive rations and annuities at the time that this takes effect, as follows: One-half of said interest shall be so expended for the promotion of industrial and other suitable education among the said Indians, and the other half for such purposes, including reasonable cash payments per capita, as in the discretion of such Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support."
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> 25 Stat. at Large, page 895.

This is the fund called the "Sioux Trust Fund" in the fifth paragraph of the bill.

The method of the payment of the interest on this fund was changed in 1880 by the Act of 1880, Chapter 41, as follows:

> "The Secretary of the Interior be, and he is hereby authorized to deposit in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds or other stocks and securities belonging to the Indian Trust Fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits in lieu of investments, and the United States shall pay interest semi-annually from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties, or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress."

This provision is partially cited in the bill in Paragraph 6.

Sioux Treaty Fund.

Under a treaty between the United States and different tribes of Sioux Indians made on April 29, 1868 (15 Stat. at Large, page 635), these Indians made large cessions of land and other rights, and in partial consideration therefor, the United States agreed with them as follows:

> "Art. VII. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of those as are or may be

settled on said agricultural reservations, and they, therefore, pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school, and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with, and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of our English education shall be furnished who will reside among said Indians and faithfully discharge his or her duties as a teacher. This provision of this article to continue for not less than twenty years."

By the Act of Congress of February 28, 1877, Ch. 72 (19th Stat. at Large, pages 254-6), ratifying an agreement with bands of Sioux nation, in consideration of further land cessions, it was provided :

"In consideration of the foregoing cession of territory and rights and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization to furnish to them schools and instructions in mechanical and agricultural arts as provided by the treaty of 1868."

By the seventeenth Section of the Act of 1889, Ch. 405 (25th Stat. at Large, 894), it was provided—

"that the 7th Article of the said treaty of April 29, 1868, securing to said Indians the benefit of education, subject to such modifications as Congress shall deem most effective to secure said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the Act shall take effect."

By the Act of 1905, Ch. 1479 (33 Stat. at Large, page 1048), entitled—

> "An Act making appropriations for current and contingent expenses of the Indian Department and for fulfiling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1906, and for other purposes"—

it was provided under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," as follows:

> "For support of and maintenance of day and industrial schools, including erection and repairs of school buildings in accordance with Art. 7 of the treaty of April 29, 1868, which article was continued in force for twenty years by Section 17 of the Act of March 2, 1889, $225,000."

A similar appropriation has been annually made for many years back in the Indian Appropriation Acts.

This is the "Treaty Fund" in dispute, referred to in the 4th paragraph of the bill. (Record, pages 18-21.)

III.

Action of the Government as to the Application of Tribal Funds for Mission Schools.

Prior to 1900 the sectarian schools were aided by appropriations from the public moneys, and in the discretion of the Secretary of the Interior, from the tribal funds just described.

In 1900 not only the public appropriation ceased, as has been heretofore shown, but all aid from the tribal funds also ceased, except as to the Osage Treaty and trust funds hereinbefore referred to. At the request of the Osage Indians, their treaty funds have been annually and uninterruptedly applied to the Catholic mission schools under annual contract with the Commissioner of Indian Affairs, approved by the

Secretary of the Interior. With the exception of the Osage funds, no "Tribal Funds" were applied to education in denominational schools from 1900 to 1904 (Record, page 21).

In the meantime application was made to President McKinley by the "Bureau of Catholic Indian Missions" for the revocation of the "Browning Ruling" and the use of "Tribal Funds" for the education of the Catholic Indian children in Catholic schools.

On September 30, 1896, the then Commissioner of Indian Affairs, D. M. Browning, in answer to the question, "whether parents of Indian children have the right to decide where their children shall attend school," said :

> "It is your duty first to build up and maintain the Government day schools as indicated in your letter, and the Indian parents have no right to designate which school their children shall attend."

This was the "Browning ruling." It was ordered abrogated by President McKinley in 1901, and some eight months after, to wit : January 17, 1902, it was formally abrogated by the Commissioner of Indian Affairs with the approval of the Secretary of the Interior (Record, page 21).

The question of the use of the "Tribal Funds" was referred by President McKinley to the Secretary of the Interior, and by him to the Commissioner of Indian Affairs, who decided adversely to the appropriation on February 12, 1901.

On or about January 1, 1904, the matter of the application for the use of "Tribal Funds" for the education of Indian children in Mission Schools was brought to the attention of President Roosevelt by the "Bureau of Catholic Indian Missions," who urged that the Indians should be allowed to use their own money in educating their own children in the schools of their choice.

President Roosevelt took up the matter on January 22, 1904, at a meeting in the Executive Office of the White House at which were present the Attorney-General (Mr. Knox) and Mr. Russell, of the Department of Justice, and Secretaries Hitchcock, Cortelyou and Wilson, and Postmaster-General Payne. The President was legally advised that, notwithstanding the declaration of Congressional intent not to make appropriations in the future of public moneys of the American people for sectarian institutions, the previous laws giving the Secretary of the Interior discretion to use certain moneys of the Indians held in trust in any way that he might see fit, including assistance to sectarian schools, were not repealed, and consequently his discretion remained.

The President decided that inasmuch as the legal authority existed to grant the request of the Indians, they were entitled as a matter of moral right to have the moneys coming to them used for the education of their children as the schools of their choice.

A full and detailed statement of the action of the President in 1904 is set forth in his letter of February 3, 1905, which is herein set out at length :

"THE WHITE HOUSE,

WASHINGTON, *February 3, 1905.*

THE SECRETARY OF THE INTERIOR :

"I have received from you the letter of the Commissioner of Indian Affairs, of January 31, 1905, in relation to the inquiries of the Hon. James S. Sherman as to the authority for granting contracts for education of Indians in denominational schools. This letter of the Commissioner of Indian Affairs asks that the general questions raised in Mr. Sherman's letter of January 23d be united with the special question raised by the Commissioner in his letter of January 21st, and presented to the President for submission to the Attorney-General.

"The letter of January 21st, concerning the payment of a claim filed in the Office of Insular Affairs in connection with the contract with St. Labre School, on the Tongue River Reservation, stands by itself and will be submitted to the Attorney-General for his consideration and report.

"As regards the general question, I have received from the Attorney-General, under date of February 2d, a letter, a copy of which is enclosed. Early in 1902, petitions on behalf of various Catholic and Episcopal schools were brought to my attention by certain ecclesiastics and laymen, who requested the Interior Department to distribute the rations and annuities through the mission schools of their several churches when the children were in the care of those schools. The Attorney-General decided that this request was illegal and could not properly be granted. Over a year afterwards the request was made, originally on behalf of certain Catholic shools in 1903, also on behalf of a Lutheran school in 1904, that where there were Indian moneys held in trust for the Indians by the Secretary of the Interior, the interest on these Indian moneys being distributed among the individual Indians or in such other ways as the Secretary of the Interior might direct, and where certain of the Indians petitioned that the moneys so distributed to them should be used for the support of the particular denominational school which they desired their children to attend, this petition should be granted. The question raised was of course wholly different from that originally raised on behalf of the Episcopal Church and of the Catholic Church.

"This new request was submitted to the Department of Justice, and the Department decided, as set forth in the accompanying report, that the prohibition of the

law as to the use of public moneys for sectarian schools did not extend to moneys belonging to the Indians themselves, and not to the public, and that these moneys belonging to the Indians themselves might be applied in accordance with the desire of the Indians for the support of the schools to which they were sending their children. There was, in my judgment, no question that, inasmuch as the legal authority existed to grant the request of the Indians, they were entitled as a matter of moral right to have the moneys coming to them used for the education of their children as the schools of their choice. Care must be taken, of course, to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled. But if these two conditions are fulfilled, it is, in my opinion, just and right that the Indians themselves should have their wishes respected when they request that their own money—not the money of the public—be applied to the support of certain schools to which they desire to send their children. The practice will be continued by the Department unless Congress should decree to the contrary, or, of course, unless the Courts should decide that the decision of the Department of Justice is erroneous.

"It is, however, greatly to be desired that the bill introduced by Representative Lacey and providing for permission to allot these annuities in severalty to the Indians, exactly as is now done with land, should be enacted into law. Its enactment and administration would prevent the rising of any question of this character, for each individual Indian would then be left free to use the money to which he is entitled outright on his own initiative instead of having it used for him by the

Secretary of the Interior in consequence of his petition. I earnestly hope that Congress will at once enact this bill into law.

"The special case of the St. Labre school stands by itself, the question being whether the contract entered into is one authorized by the finding of the Department of Justice in January, 1904, or whether it is one of those cases forbidden under the decision of the Department of Justice of January, 1902. The Attorney-General will speedily report the category in which this case comes.

THEODORE ROOSEVELT."

(Record, pages 22-3.)

The enclosure referred to is found on pages 23 to 26 of the Record.

Accordingly the following contracts were made by the United States with various sectarian organizations for the education of Indian children from "Tribal Funds" for the fiscal year ending June 30, 1905:

Name of School.	Denomination.	Pupils.	Tribe.	Rate per annum.	Total for year.
St. Joseph	Catholic	170	Menominee	$108	$18,360
St. Louis	Catholic	75	Osage	125	9,375
St. John	Catholic	65	Osage	125	8,125
Immaculate Conception	Catholic	65	Sioux	108	7,020
Holy Rosary	Catholic	200	Sioux	108	21,600
St. Francis	Catholic	250	Sioux	108	27,000
St. Labre	Catholic	60	Northern Cheyenne	108	6,480
St. Mary	Catholic	10	Quapaw	50	500
Zoas' Boarding School	Lutheran	40	Menominee	108	4,320
Total		935			$102,780

(Record, page 26.)

In June, 1905, the Commissioner of Indian Affairs was notified by the "Bureau of Catholic Indian Missions," that

it was prepared to care for and educate during the fiscal year ending June 30, 1906, Indian pupils at the several schools carried on by it among the Sioux, Menominee, Osage, Northern Cheyenne and Quapaw tribes upon the same terms and conditions as stipulated in its contracts for carrying on these schools for the fiscal year 1905, and requested that it be granted a renewal of the contracts in question, payable in each case from the trust and treaty funds of the tribe among which the school is located for the twelve months, beginning July 1, 1905.

To this application, the Commissioner replied that the request would receive careful consideration; that the applicability of the trust and treaty funds had been submitted to the proper authorities for a definite determination, and indicated how petitions should be prepared, and the safeguards under which the signature of the Indians should be made. Petitions were duly filed, signed under all these safeguards, by the Catholic Indians.

In the meantime, the schools were opened at the usual time and instruction given to the required number of pupils in the confidence that the contracts applied for would be renewed.

The Attorney-General not having rendered any decision in the matter, the President, by a letter dated December 23, 1905, addressed to the Commissioner of Indian Affairs, after quoting a part of his letter of February 3, 1905, hereinbefore referred to, said:

> "There are two kinds of Indian funds involved in this matter. One is the trust fund, which requires no appropriation by Congress, and which clearly is to be administered as the Indians themselves request. As regards this fund you will treat it on the assumption that the Indians have the right to say how it shall be used, so far as choosing the schools to which their children are to go is concerned; and each Indian is a tribe to be

credited with his *pro rata* share of the funds which you will apply for him to the Government school where that is the school used, or to the church school where that is the school used, instead of segregating any portion of the fund for the support of the Government school and prorating the balance.

"The other fund consists of moneys appropriated by Congress in pursuance of treaty stipulations. As to these moneys it is uncertain as to whether or not the prohibition by Congress of their application for contract schools applies—that is, whether or not we have the power legally to use these moneys as we clearly have the power to use the trust funds. It appears that certain of the contract schools are now being run in the belief that my letter quoted above authorized the use of the treaty funds. It would be a great hardship, in the absence of any clearly defined law on the subject, to cut them off at this time arbitrarily, and inasmuch as there is a serious question involved, I direct that until the close of the fiscal year these schools be paid for their services out of the moneys appropriated by Congress in pursuance of treaty obligations, on the same basis as the schools paid out of the trust funds—always exercising the precautions directed in my letter of February 3, 1905, 'to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rate* proportion to which the Indians making the petition are entitled.' But no new contracts are to be entered into for such payments after the close of the present fiscal year, unless there is authorization by Congress or some determination by the Courts" (Record, page 27).

Accordingly, the contracts for the fiscal year ending June 30, 1905, hereinafter set forth, were renewed for the fiscal

year ending June 30, 1906, the new contracts being executed as of July 1, 1905.

The services have been performed under all these contracts and the money paid in all of them, except under the contract with the "Bureau of Catholic Indian Missions" for the education of 250 Indian pupils at St. Francis Mission School on the Rosebud Reservation. The payment of the $27,000 which is due under this contract has been withheld pending the decision by this Honorable Court as to validity of the contract and the appropriation of tribal funds for such purposes.

The contract for this $27,000 was made between F. E. Leupp, Commissioner of Indian Affairs, for and on behalf of the United States of America and the "Bureau of Catholic Indian Missions," executed as of July 1, 1905, for the care, education and maintenance of 250 Indian pupils at the St. Francis Mission School, Rosebud Reservation, South Dakota, at $108 per capita per annum, amounting to $27,000. The contract was approved by Jesse E. Wilson, acting Secretary of the Interior.

Application for the contract was made by the "Bureau of Catholic Indian Missions" on June 6, 1905.

On March 26, 1906, a petition duly and genuinely signed by 212 members of the Sioux tribe of Indians of the Rosebud Agency, South Dahota, was filed, asking that the said contract applied for be entered into with the Bureau.

The payments under the contract were to be made from the "Sioux Trust Fund" and the "Sioux Treaty Fund," as hereinbefore described, in the discretion of the Commissioner of Indian Affairs."

There are 4,986 Indians on the rolls of the Rosebud Reservation, and the amount of tribal income applicable to education, in the discretion of the Commissioner, is—

$250,047.90, or a per capita of $50.15.

The 212 petitioners represent 669 shares, or $33,550.35, and of this they ask that $27,000 be used for the education of their children in St. Francis Mission School. The following table will represent the pro rata shares in these tribal funds, and the per capita share :

4,986 Indians,	$250,047.90 Tribal Funds $50.15 per capita.
669 shares Petitions,	33,550.35 Tribal Funds $50.15 per capita.
4,317 Petitions (nonpetitions)	
4,986	$250,047.90 Tribal Funds $50.15 per capita.

The cost of the Government school for the fiscal year was about $76,830. Since the shares of the petitioning Indians amount to $33,550.35 and the sum asked for the school is only $27,000 out of this share, and the petitions were genuinely signed, the terms of the executive order of President Roosevelt of February 3, 1905, *e. g.*, "to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled" have been strictly carried out.

The services under this contract have been fully performed to the satisfaction of the Commissioner of Indian Affairs, and the twenty-seven thousand dollars ($27,000) agreed to be paid is due and payable, if this Honorable Court determines that it is legally payable out of the "Sioux Trust Fund" and the "Sioux Treaty Fund" (Record, pages 28-9).

IV.

Action of the Federal Courts in the District of Columbia.

The validity of the contract for $27,000 above referred to, was attacked by a bill filed by the present appellants on May 11, 1906, in the Supreme Court of the District of Columbia against the present appellees (Record, pages 1-10).

The parties plaintiff, members of the Sioux tribe of Indians of the Rosebud Agency, in the State of South

Dakota, were only nominal plaintiffs, the real plaintiff being the Indian Rights Association, who had the suit brought for the purpose of testing the validity of the contract hereinbefore referred to.

The parties defendant are all officers of the Government of the United States, and are interested in the controversy only to the extent of ascertaining their duties in the premises. The real defendant is the "Bureau of Catholic Indian Missions," a Maryland corporation, with whom the aforesaid contract was made. It was for this reason that the President appointed special counsel to represent the real party in interest (Record, page 11).

The case was submitted on bill and answer, and also upon certain replies made by the Commissioner of Indian Affairs (Record, pages 31-6), and a stipulation that of the $27,000 involved in the contract about $24,000 would be payable out of the "Sioux Treaty Fund," and about $3,000 from the "Sioux Trust Fund" (Record, page 49).

The Supreme Court of the District of Columbia, by Ashley M. Gould, Justice, on April 15, 1907, decreed an injunction against paying any part of said $27,000 from the "Sioux Treaty Fund," but allowed payment from the "Sioux Trust Fund" (Record, page 47).

On appeal from the decree, the Court of Appeals of the District of Columbia, unanimously reversed the decision of Mr. Justice Gould, and decide that the contract was legal and payable from both funds. The opinion of the Court, by Mr. Justice Wright, is set forth in full in the record, pages 54-63. From this decision the present appeal is taken.

V.

The Legality of the Contract.

The appellants attack the validity of this contract on the ground that all contracts for sectarian education among the Indians are forbidden by certain provisos contained in the

Indian Appropriation Acts of 1895, 1896, 1897, 1898 and 1899. The appellees contend that these provisions have no application whatever to the "Tribal Funds" which belong to the Indians but relate only to the gratuitous appropriations made by the Government.

The solution of this question lies in a clear understanding of the essential difference between the public moneys of the United States raised by taxation from persons of all creeds and faiths, and appropriated gratuitously, as so finely expressed by the Court of Appeals, for the purpose of education among the Indians, and "Tribal Funds" which belong to the Indians themselves, and which should be used as they direct. Every man can readily understand the reasonableness of the objection of using public moneys raised by taxation from the Catholic, the Protestant, the Jew or the infidel, to support a Catholic School, and every man should also understand that a Catholic, even though an Indian, should not be prevented from having his own money expended in educating his children in Catholic Schools if he so desires. This essential difference in the nature of the two funds clears up and explains the whole controversy.

This difference is recognized, and has been recognized for many years by the annual Indian Appropriation Acts of Congress.

An examination of these annual Acts of Congress shows that the gratuitous appropriation of public moneys for the purposes of Indian education has always been made under the heading—"Support of Schools," whilst the appropriation of the "Treaty Fund," has always been under the heading—"Fulfilling Treaty Stipulations and Support of Indian Tribes," and the "Trust Fund" is not in the Indian Appropriation Acts at all.

These things are kept separate, not by accident or inadvertence, but because they are essentially different in their nature. One relates to public moneys belonging to the

Government; the other to moneys which belong to the Indians, and which is administered for them by the Government as a trustee or guardian.

VI.

Appropriations of Public Moneys for Education Among the Indians.

An examination of the provisos relied upon by the appellants will demonstrate that they were intended only to limit the use of public moneys for sectarian education. As appears from the statement of the case in this brief, before 1895, the government for a number of years, had made contracts with sectarian schools for the education of the Indians, and the money due on these contracts was paid in the discretion of the Commissioner of Indian Affairs, from the "Tribal Funds," and from the gratuitous public appropriations. But in 1894 opposition developed against appropriating public moneys for sectarian education. Accordingly in the Indian Appropriation Act of 1894, Ch. 290, under the heading of "Support of Schools," at the place where the public moneys of the government were appropriated for this purpose, the Secretary of the Interior was directed to investigate the propriety of discontinuing contract schools and to make such recommendations as he might deem proper (Record, page 15).

In reply to this, the Secretary of the Interior in his annual report for 1894, said: "I agree fully with those who oppose the USE OF PUBLIC MONEY for the support of sectarian schools,' but he suggested a gradual reduction in the public appropriations on account of the money which had been invested in these schools with the approbation of the government. He further said: "It would be scarcely just to abolish them entirely—to abandon instantly a policy so long recognized," by which he meant it would not be just to withdraw public appropriations from these schools which had grown up and

done so much good with the help of these appropriations. He continues: "My suggestion is that they should be decreased at the rate of not less than 20% a year. Thus in a few years they would cease to exist, and during this time the Bureau would be gradually prepared to do without them, while they might gather strength to continue WITHOUT GOVERNMENT AID. This is the policy which is now controlling the department, and, unless it is changed by legislation, it will be continued. THE DECREASE IN THE APPROPRIATION for the present fiscal year is 20%" (Record, page 15).

It is obvious thus far that all the Secretary of the Interior was dealing with, was the appropriation of the public moneys for sectarian education among the Indians. The matter was referred to him by virtue of a proviso in the Indian Appropriation Act, which dealt only with the appropriation of public moneys for "*Support of Schools*" among the Indians. He expresses his assent to the objection of those who opposed "*the use of public money for the support of Sectarian Schools.*" He suggests a decrease of 20% a year and expressly says that this is a decrease in the appropriation of public moneys, and indicates that the contract schools might gather strengh to continue "without *government aid.*" The whole thought here is concerned with the gradual decrease of the public appropriations for Sectarian Schools. There is not the remotest allusion to restricting the Indians in the use of their own moneys.

In accordance with this recommendation, Congress for the first time introduced in the appropriation Act of 1895, Ch. 188, a limitation on the use of public moneys in Sectarian Schools.

This Act appropriates under the heading "Support of Schools" of the public money of the United States "for the support of Indian day and Industrial Schools and for other purposes" . . . $1,164,350. . . .

"Provided that the Secretary of the Interior shall make contracts, but only with the present contract schools, for the education of Indian pupils during the fiscal year ending June 30th, 1896, to an extent not exceeding 80% of the amount so used in the fiscal year 1895, and the Government shall as early as practicable, make provision for the education of Indians in Government Schools" (Record, page 15).

On the face of this statute it is obvious that Congress was dealing with the application of an appropriation of *public money* for education among the Indians. The sum appropriated was $1,164,350. Of this sum 80% was authorized to be expended with contract schools, as these were the schools which up to that time had educated the Indians. This 80% limitation was in precise accordance with the suggestion of the Secretary of the Interior. It is contained in a proviso to the appropriation of public money under the head of "Support of Schools." There is not the slightest reference to tribal funds.

In the Indian Appropriation Act of 1896, Ch. 398, under the same heading "Support of Schools," the appropriation of public money of $1,235.000, is limited by a proviso that contracts should only be made at places where non-sectarian schools can not be provided for Indian children to an amount not exceeding *50%* of the amount so used for the fiscal year 1895.

In this Act immediately after the appropriation of public money, as just recited, occurs the expression—"And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." This is the expression seized upon by the appellants as applicable to "Tribal Funds." But is it not obvious that it was intended to be a limitation only on the use of public moneys gratuitously appropriated

for such purpose? It is placed in the Act immediately in conjunction with such public appropriation, it does not refer in the remotest way to moneys belonging to the Indians themselves, and it is difficult under any consideration to give it any effect. For although by its terms it expresses a *settled policy* of the Government to "*hereafter*," which means, after 1896, to make no appropriation whatever for education in any sectarian school, we know perfectly well that Congress was then pursuing the policy suggested by the Secretary of the Interior, and intended to make appropriations, *even from the public moneys*, in 1897, 1898, and 1899, for sectarian education with a yearly reduction of about 20%.

Thus, in the Appropriation Act of 1897, the same declaration of policy occurs, as a limitation on the appropriation of public moneys, under the heading "Support of Schools," but the amount applicable to contract schools was limited to 40% of the amount used in 1895 (Record, page 16).

In the Act of 1898, the amount applicable to contract schools was limited to 30%, and in the Act of 1899, the amount so applicable was limited to 15%, with the significant addition of these words—"*this being the final appropriation for Sectarian Schools.*"

The expression of the settled policy of the Government, which was immediately unsettled by subsequent Acts, is found only in the Acts of 1896 and 1897.

Why was it not continued in the Acts of 1898 and 1899, both of which made appropriations of *public money* for sectarian education, if the phrase is to have the far reaching effect attributed to it by the appellants? The reason is simple. Congress was dealing only with the appropriation of public moneys for sectarian education. These appropriations were being reduced at the rate of 20% a year, so that in five years they would entirely cease. The policy of the Government would be entirely carried out, therefore, by introducing a rule of construction, that appropriations of public moneys

under the head of "Support of Schools," should mean, support of non-sectarian or Government schools, unless the application of such moneys to sectarian schools were expressly provided for. The application of such public moneys to sectarian schools was expressly provided for for five years only, at a yearly reduced rate, and the whole of such application stopped in 1900, by virtue of the provision in the Act of 1899, "*this being the final appropriation for sectarian schools.*"

All Acts since 1899 appropriate public moneys under the heading "Support of Schools" simply "for the support of Indian and industrial schools and for other educational purposes," without saying anything about sectarian schools (Record, page 17).

This means, of course, Government or non-sectarian schools. Why? Because of the rule of construction given those general words by the declaration of policy and the provisos already referred to in the Acts from 1895 to 1899.

When Congress by a declaration of policy decides against appropriations for sectarian education as a limitation in the application of moneys appropriated from the public funds, and specifically declares in 1899, that the appropriation thus made shall be the "final appropriation for sectarian schools," the effect of these declarations is to introduce a rule of construction in subsequent appropriations for education, making them to mean that sectarian schools are excluded from sharing in these appropriations unless expressly and in terms included. This is the only effect of the provisions cited. They are used as limitations in the use of public moneys appropriated gratuitously under the head of support of schools; and can have no other effect. Their purpose effectively achieved by the cessation of all appropriations of the public moneys for the use of sectarian schools.

And this is in accordance with the ordinary rules of statutory construction.

A proviso or exception as a general rule relates only to the paragraph or distinct portion of the enactment which immediately precedes it, and is to be confined by construction to the subject-matter of the section of which it is a part.

Savings Bank vs. Collector, 3 Wall. 495.
Henderson's Tobacco, 11 Wall. 658.
Dollar Savings Bank vs. U. S. 19 Wall. 227.

Of course there are exceptional cases where the word "proviso" is tantamount to "but" or "and," as when parties desirous of securing amendments to bills introduce them by the word "provided;" but such cases are easily distinguishable. If the "proviso" is germane to the section or clause to which it is attached, and is a limitation upon it, it would require the strongest reasons to wrench it from its grammatical and logical context and make it a limitation upon an entire statute.

VII.

The "Treaty Funds."

But the appellants rest their whole case upon their attempt to make these provisos and declarations of policy, attached as we have seen to the appropriation of public money to the "Support of Schools," applicable by construction to appropriations in fulfillment of treaty stipulations which are found in an entirely different part of the statutes and which are not public moneys at all in the sense in which these words have been used in this brief.

The statement of the case shows that in 1868 the United States made a treaty with the Sioux Indians. The Indians under this treaty made large cessions of lands and other rights. In consideration of this the United States agreed that for every thirty children a house should be provided, and a teacher competent to teach the elementary branches of our English education should be furnished for twenty years.

In 1877, in consideration of further land cessions, the United States agreed to furnish all necessary aid to assist the Indians in the work of civilization and furnish them schools and instruction in mechanical and agricultural arts as provided by the treaty of 1868.

In 1889 Congress extended the obligations of the treaty for twenty years subject to such modifications as Congress shall deem most effective to secure said Indians equivalent benefits of such education (Record, page 20).

Thereafter in every annual Indian Appropriation Act there was an appropriation to carry out the terms of this treaty under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes." Those appropriations are in a different part of the Act and rest upon entirely different grounds from the gratuitous appropriations of public moneys under the heading "Support of Schools."

For example, the Indian Appropriation Act of 1895 (28 St. 888), deals with many subjects under separate and appropriate headings. On page 879 appears the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," under which heading the appropriation is made for carrying out the treaty of 1868, the "Treaty Fund" in dispute; and on page 903, nearly thirty pages removed from the first, is the distinct heading "Support of Schools," under which is contained the proviso relied upon by the appellants.

The same separate treatment of these two subjects is found in every appropriation Act.

Not only are these two classes of appropriations treated separately in each Act, but they should be as they are essentially different in character. One is the gratuitous appropriation of public money for the purpose of Indian education. As the money is public money raised by taxation from people of all or no creeds, it is rational to insist that it shall not be used for the teaching of a special form of religion.

But this "treaty fund" is not public money in this sense. It is money which belongs to the Indians themselves. It differs from the "Trust Fund" only in this: The "Trust Fund" has been set aside for the Indians and the income expended for their benefit. This expenditure of income requires no annual appropriation. The whole amount due the Indians for certain land cessions was appropriated in one lump sum, by the Act of 1889, Ch. 405.

This is held for the Indians and not distributed per capita, only because of the Indian Tribal custom of holding property in common. The Government is trustee for the Indians, and the money is distributed in accordance with the discretion of the Secretary of the Interior. The money really belongs to the Indians. It is the price of lands which they ceded to the Government. As to this "Trust Fund," no one, except counsel for the appellants, seem to have had any difficulty. The President of the United States declared it to be the moral right of the Indians to have this "Trust Fund" applied to the education of Indians in the schools of their choice (Record, page 23).

And so both the Supreme Court of the District of Columbia and the Court of Appeals in the District of Columbia decided.

Now the "Treaty Funds" have exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the Government. The only difference is that in the "Treaty Funds" the debt to the Indians created and secured by that highest of obligations, *a Treaty*, are paid in instalments. Instead of there being one appropriation, out of which afterwards the interest is paid, as in the "Trust Fund" there are annual appropriations. But this does not change the character of the appropriations. They are not gratuitous appropriations of public moneys. *They are payments of a treaty debt in instalments.* Like the payment of any other Government

obligation they must be paid through the means of an appropriation.

This being the case, what possible justification can there be for bringing a proviso or declaration of policy attached to a gratuitous appropriation of public money for the support of Indian schools, nearly thirty pages away in the same Act, and for applying it to the payment of treaty obligations. The two things are not connected together in the Act. They are distinct and different in nature. They have no relation with each other except that both are technically appropriations.

VIII.

The Constitutional Question.

Counsel for appellants endeavor to support their contention by invoking the Constitution of the United States.

The Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

We do not understand counsel for appellants to contend that this contract with the "Bureau of Catholic Indian Missions" to be unconstitutional. Indeed, it would be difficult to make such a contention in view of the appropriation for such purposes from almost the beginning of the government, the length of the contract school system, and the adjudications of the Federal Courts.

By the Act of March 3, 1897, making appropriations for the District of Columbia, Congress appropriated $30,000 for two isolating buildings to be constructed at the discretion of the Commissioners of the District on the grounds of two hospitals to be operated as a part of said hospitals. In the Act was this declaration:

> "And it is hereby declared to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding,

maintaining or aiding by payment for services, expenses or otherwise, any church or religious denomination or institution or society which is under sectarian or ecclesiastical control, and it is hereby enacted that from and after the 30th day of June, 1899, no money appropriated for charitable purposes in the District of Columbia shall be paid to any church or religious denomination or to any institution or society which is under sectarian or ecclesiastical control."

(29 Stat. 683.)

This clause was supposed to have been passed with the view to carrying out the spirit of the First Amendment providing that Congress shall make no law respecting an estabment of religion or prohibiting the free exercise thereof.

The Commissioners made a contract with Providence Hospital, an institution owned and controlled by the Sisters of Charity, a monastic order of sisterhood of the Roman Catholic Church, for the erection of one of the isolating buildings provided for in the contract. In a proceeding to enjoin the Treasurer of the United States from paying out money under this contract on the ground of its being in violation of the statute in question and of the First Amendment, an injunction was granted in the lower Court (25 Wash. Law Rep., 85). On an appeal to the Court of Appeals this order was reversed, the Court saying:

"It is indeed difficult to conceive what effect this declaration or enactment can have in any event. Clearly, it cannot affect the appropriations of money that would be exhausted before it takes effect, and it can not bind the succeeding Congress when it comes to enact an appropriation bill for the year beginning July 1, 1898. It seems to be nothing more than a mere declaration of an abstract view of public policy that is not permitted to affect the operation of the Act which it

was made a part, and that can not, for obvious reasons, control or limit expenditures under specific appropriations which may be similarly itemized and designated in the Act of a succeeding Congress."

(Roberts vs. Bradfield, 12 App. Cas. 475.)

From the Court of Appeals the appellee therein appealed to the Supreme Court of the United States. In this Court the decision of the Court of Appeals was affirmed.

Bradfield vs. Roberts, 175 U. S. 291.

But although they do not claim that the contract is unconstitutional, they do contend that the spirit of the Constitution requires that the declaration of policy—"And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school"—should be taken from its immediate context and made applicable even to a technical appropriation to pay a treaty debt contained in another part of the Act.

If we understand their proposition, it is this: That the Constitution intended "to build a wall of separation between Church and State;" that therefore the actions of the United States must always be undenominational; that therefore the Government can never act in a sectarian capacity either in the use of its own funds or in that of the funds of others for whom it is a trustee; that therefore even the "Sioux Trust Fund" cannot be applied for education in Catholic schools, even though the owners of the funds so desire it.

With great respect we regard this as a most extraordinary contention. Here are funds belonging to Catholic Indians being administered by the government for their use. These Indians believe as the Catholic Caucasians believe, that the most important part of the education of their children, is their education in the Catholic religion in Catholic schools. They have the money to pay for it, and they ask that the

money be so applied. They are told that they cannot use their own money to educate their children in the schools of their own choice, because the government must act in an undenominational way. But is it undenominational to prevent a Catholic Indian from educating his children with his own funds in a Catholic school? Is it not on the contrary a direct interference with his religious rights? It is almost as bad as the Browing ruling abolished by President McKinley which forbade the Catholic Indian parent from choosing a Catholic education for his children. It is a patent invasion of the parental right to educate his children according to the obligations of his own conscience. This thought was strongly expressed by the Court of Appeals when they say—

> "The 'Treaty' and 'Trust' moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended for their benefit and in part for their education; it seems inconceivable that Congress should have intended to prohibit them from receiving religious education at their own cost if they so desire it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians, and such would be the effect of the construction for which the complainants contend" (Record, page 62).

No. The policy to make no appropriation for education in sectarian schools simply means that Indians shall not be educated in religious schools gratuitously at the cost of public donations, and does not mean that the religious Indian should be deprived of the liberty of educating his children in a school of his own choice at the cost of his own money (Record, page 61).

The Catholic Indians are not asking for Government aid. They are simply asking to be protected in their liberty of conscience. They desire to fulfill what to them are conscientious obligations in the very important matter of the education of their children; and the Government of the United States is the last Government in the world to deny them the right to use their own funds for such a purpose.

IX.

Aids to Interpretation.

Sometimes light is shed upon the question of the proper interpretation of an Act of Congress by showing what Congress did or refused to do subsequently with reference to the question in dispute.

Now it is clear that since 1900 attempts have been made in Congress to prevent the application of these "Treaty" and "Trust" funds to religious schools, but these attempts have failed, that discrimination against Mission Schools in the distribution of rations has been forbidden, and that direct application of funds received from royalties from gas and oil has been made by Congress to religious schools in the Osage Indian Reservation.

On December 13, 1905, Mr. Stephens introduced in the House of Representatives the following bill:

> "A Bill to Prohibit the Use of Indian Trust Funds for the Purpose of Educating Indian Children in Sectarian Schools.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the administration and disbursement of funds held in trust for the Indian tribes by the United States that part of the Act of June 7, 1897 (Thirteenth Statutes, page 79), which provides, 'and it is hereby declared to be the settled policy of the Government to hereafter

make no appropriation whatever for education in any sectarian school,' shall apply to any trust fund or interest thereon held by this Government for the benefit of any Indian tribes by the United States, and no such trust funds shall be appropriated or used for purposes of education in any sectarian or denomination school so long as such trust fund belongs to any Indian tribe."

The bill did not pass, but was laid on the table in the Committee on Indian Affairs, to whom it had been referred (Record, page 29).

When the Senate of the United States was considering the Indian Appropriation Bill for the fiscal year ending June 30, 1906, it passed an amendment reported by the Committee on the District of Columbia as amended by Senator McCumber.

The original amendment was in these words:

"That no portion of the funds appropriated by this Act, nor the principal nor interest of any Indian Trust or Tribal Funds held by the United States for the benefit of any Indian tribe shall be available, nor be expended for the support of any sectarian or denominational school."

This amendment was not passed by the Senate in this form, but as amended by Senator McCumber as follows:

"Provided, however, that the individual owner or beneficiary of any interest in such fund who may desire to educate his ward, child or children in any school other than a Government school, may, by written order signed by him, direct that any portion of the interest accruing to him, or which would be allotted to him on such fund, be paid to the school in which such ward, child or children may be educated."

No part of the amendment, however, was passed by Congress, the whole being eliminated from the bill in conference committee, whose report was adopted (Record, page 30).

On February 10, 1902, there was a decision by the then Attorney-General that the rations to which the Sioux Indians were entitled under the agreement ratified by Act of Congress of February 28, 1877 (19th Stat. L., 254), could not be distributed to children in the mission schools.

The effect of this was that rations were distributed to children who remained at home in ignorance and away from school, and were also distributed to children who attended Government schools, but those children who attended mission schools were deprived of the rations.

In the Indian Appropriation Act for the fiscal year ending June 30, 1907, Congress enacted as follows:

> "Mission schools on an Indian reservation, may, under rules and regulations prescribed by the Commissioner of Indian Affairs, receive for such Indian children duly enrolled therein, the rations of food and clothing to which said children would be entitled under treaty stipulation if such children were living with their parents."

Congress, by an Act approved June 28, 1906, "for the division of land and funds of the Osage Indians in Oklahoma Territory and for other purposes," enacted, among other things, as follows:

> "There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School, and for other schools on the Osage Indian Reservation conducted, or to be established, and conducted for the education of Osage children."

There are three schools on the Osage Indian Reservation conducted for the education of Osage children: The Osage Boarding School, the St. Louis School for Girls, and the St. John School for Boys; the first is a Government school, the latter two are Catholic Mission Schools, for whom, as hereinbefore stated, contracts have been made uninterruptedly for a great number of years for the education of Indian children of the Osage tribe, payable out of Osage Treaty Funds (Record, page 30).

It is therefore respectfully submitted that the decision of the Court of Appeals of the District of Columbia should be affirmed.

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